

FAIR POLITICAL PRACTICES COMMISSION
Memorandum

To: Chairman Randolph and Commissioners Blair, Downey, Huguenin and Remy

From: Emelyn Rodriguez, Counsel, Legal Division
John W. Wallace, Assistant General Counsel
Luisa Menchaca, General Counsel

Subject: Prenotice Discussion of Amendments to Regulations 18942 and 18944 – Gift Regulations Involving Wedding Gifts, Baby Showers and Receptions

Date: January 25, 2006

.....

I. EXECUTIVE SUMMARY

This memorandum addresses proposed amendments to regulations 18942 and 18944 under the Political Reform Act (the “Act”),¹ relating to “gifts” received through attendance of wedding receptions, birthdays, holidays and other similar occasions, as well as gifts given to an official but intended for use by the official’s child, such as baby shower gifts.

These changes are proposed, in part, to clarify the scope of regulation 18946.2(b), which was recently amended to provide for reporting of invitation-only events – such as a banquet, party, gala, celebration or similar function – by public officials and candidates. Regulation 18946.2(b) requires that an official or candidate attending an invitation-only event, report his or her pro rata share of the cost of the event. The language of this regulation is broad enough that it encompasses attendance at weddings, birthday parties and similar special events of personal significance.

Consistent with the exception under section 89503(e)(2), proposed amendments to regulation 18942(a)(8) would clarify that food, drink, entertainment and nominal benefits received by an official attending an event such as a wedding reception, birthday, holiday or other similar occasion fall under the “gifts exchanged” exception, and therefore are not subject to gift limits and reporting rules so long as the gifts exchanged are not substantially disproportionate in value.

In addition, the proposed amendments to regulation 18944 would add a specific provision stating that gifts given directly to an official but intended for use by the official’s child (such as baby shower gifts), are gifts to the child. This is a codification of the Commission’s opinion, *In re Cory* (1976) 2 FPPC Ops. 48.

¹ Government Code sections 81000 – 91014. Commission regulations appear at title 2, sections 18109-18997, of the California Code of Regulations.

In summary, this regulatory project deals with two main issues: (1) the issue of whether the definition of “invitation-only” events in regulation 18946.2(b) should encompass attendance at weddings, birthday parties, holidays, or similar events, and therefore requires that officials and candidates report their pro rata share of the cost of these events; and (2) whether the Commission should further codify Commission opinion (*In re Cory* (1976) 2 FPPC Ops. 48) and subsequent staff advice (*Lewis* Advice Letter, A-93-173) regarding baby shower gifts as gifts to the baby, and not the official.

II. STATUTES AND REGULATIONS

The Act places certain restrictions and reporting requirements on the receipt of gifts by public officials and candidates. Elected officials, candidates for elective office, and certain state agency officials and designated employees who accept gifts, are subject to gift reporting rules, gift limits, and disqualification rules.

Definition of Gift: A gift is defined in section 82028(a) as “any payment that confers a personal benefit on the recipient, to the extent that consideration of equal or greater value is not received and includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public without regard to official status.” This section and Commission regulations, as discussed below, also provide exceptions to the definition of “gift.”

Lobbyist Definition of Gift: Section 86201 states, “‘Gift’ as used in this article means a gift made directly or indirectly to any state candidate, elected state officer, or legislative official, or to an agency official of any agency required to be listed on the registration statement of the lobbying firm or the lobbyist employer of the lobbyist.” In addition, section 86203 states that “[i]t shall be unlawful for a lobbyist, or lobbying firm, to make gifts to one person aggregating more than ten dollars (\$10) in a calendar month, or to act as an agent or intermediary in the making of any gift, or to arrange for the making of any gift by any other person.”

Gift Reporting: The Act requires that officials must report gifts received from a single source within a calendar year that total \$50 or more. (Section 87207(a)(1).)

Gift Limits: The Act prohibits candidates and officials from receiving gifts of \$360² or more in a calendar year from anyone who may influence the public official’s actions. Similarly, gifts valued at \$10 or more received in a calendar month from a lobbyist or lobbying firm by a public official are also prohibited. (Sections 89503, 86203.)

Disqualification: In addition, the Act prohibits a public official from using his or her position to influence the outcome of a decision involving the donor of a gift valued at \$360 or more. (Section 87103(e).) Under this provision, a public official is deemed to have a conflict of interest if he or she participates in a decision involving a donor of a gift

² The gift limit, currently \$360, is adjusted every two years to reflect changes in the Consumer Price Index.

to the official. The official is also prohibited from voting on or exercising any influence on the outcome of such a decision.

What is Not a Gift: The Act provides for certain exceptions to the definition of “gift” including: informational material, gifts that are not used and returned within 30 days of receipt and gifts from certain enumerated family members, among other things. (Section 82028(b).) For example, presents exchanged at holidays, birthdays or similar occasions are *not reportable nor subject to gift limits* provided that the gift exchanged is not substantially disproportionate in value. (Regulation 18942(a)(8).)

What is a Gift, but Not Subject to Limits: The Act also provides under section 89503(e)(2) that that certain “gifts,” while reportable, are not subject to the gift limits of the Act (e.g., wedding presents). (Section 89503(e)(2) and regulation 18942(b).)

Gifts to an Official’s Child: Regulation 18944(a) provides that “[g]ifts given directly to members of an official’s immediate family are not gifts to the official unless used or disposed of by the official or given by the recipient member of the official’s immediate family to the official for disposition or use at the official’s discretion.”

III. STATUTORY AND REGULATORY HISTORY

Gifts Exchanged on Holidays, Birthdays, and Similar Occasions

The current exception for gifts exchanged on holidays, birthdays, or similar occasions found in section 89503(e)(2) and regulation 18942(a)(8), reflects a series of legislative and regulatory amendments since 1978.

The origins of this exception can be traced to regulation 18727, which was adopted by the Commission in 1978.³ The original language of regulation 18727 exempted from the definition of “gift,” only those gifts received from home hospitality (food, beverages or lodging provided by an individual in his or her home). The original language of regulation 18727 also included the concept of “reciprocity” to determine whether home hospitality is considered a reportable gift.⁴ However, later amendments to the regulation eliminated the concept of reciprocity and provided instead a general exemption from reporting by officials for gifts of home hospitality, as well as the exception for gifts exchanged on holidays, birthdays or similar occasions.⁵

³ Regulation 18727 was later repealed in 1993 when the Commission adopted regulation 18942. The substance of regulation 18727 was included in subdivisions (a)(7) and (a)(8) of regulation 18942.

⁴ Legal Division memorandum by Sarah T. Cameron, dated April 24, 1978, regarding “Home Hospitality and Other Gifts Which Must be Reported by Officials – Regulations 18630 and 18727.”

⁵ Regulation 18727 stated that “[f]or the purposes of Government Code Section 87207(a), the term ‘gift’ does not include the value of gifts: (a) of hospitality involving food, beverages or lodging provided by an individual in his or her home to any public official filing a statement of economic interests; (b) exchanged between a public official filing a statement of economic interests and an individual other than a lobbyist on holidays, birthdays, or similar such occasions. This provision does not apply to the extent that the gifts received by the public official exceed in value the gifts that he or she has given.”

Legal Division memoranda explained that the rationale for these exceptions centered on the *nature of the relationship* between the donor and the recipient of the gift. Regular exchanges of gifts that flowed from familial ties or close personal relationships were not considered the type of transactions that would likely be within policy considerations of the Act because such exchanges are usually not done with the intent to influence or curry political favor with the recipient.⁶

“In other words, although an official might be biased by his or her friendship with a person who invites the official for dinner or with whom the official routinely exchanges gifts, the bias does not arise from the monetary value of the gifts, and such gifts are therefore outside the policy considerations of the Act.”⁷

However, legal staff believed that a blanket exemption for all gifts exchanged on birthdays, holidays or similar occasions could be an invitation for abuse, so the language of the regulation included a limiting provision that the gifts exchanged must be of equivalent value, and to the extent they were not, the difference was reportable.⁸

This provisions for “gifts exchanged” in regulation 18727 were based on the assumption that whenever gifts are *regularly* exchanged, “there is ‘consideration’ to the donor for each such gift in the form of a similar gift from the donee, even though both gifts may not be given at the same time, and even though one gift may not be given with the condition of receiving a similar gift in return.”⁹

In 1990, the Legislature passed SB 1738, the Ethics in Government Bill authored by Senator David A. Roberti. This legislative ethics bill, which took effect on January 1, 1991, increased the Commission’s responsibilities to interpret, enforce and administer new laws related to gifts, honoraria, personal use of campaign funds, and conflict-of-interest laws. It imposed gift limits on certain specified public officials. It also codified the Commission’s existing regulation on “gifts exchanged” under regulation 18727, as exceptions to the gift limits, “provided that the gifts exchanged between individuals on birthdays, holidays and similar occasions were not substantially disproportionate in value.”¹⁰

⁶ Similar considerations were also expressed in the *Cory* opinion (*In re Cory* 2 FPPC Ops. 48), which is cited in the Legal Division memorandum (by Sarah T. Cameron, dated April 24, 1978), as an additional basis for the exceptions. The *Cory* opinion, which is discussed in greater detail below, took into account a working or social relationship between a donor and recipient of a gift as part of the overall analysis of whether there was intent to make an indirect gift to an official.

⁷ Legal Division memorandum by Sarah T. Cameron, dated April 24, 1978, p. 2.

⁸ *Ibid.*

⁹ Legal Division Memorandum by Luisa Menchaca dated April 24, 1995 regarding “Prenotice Discussion: Proposed Amendments to Gift Regulations – Regulations 18942 (Exceptions) and 18946.3 (Reporting and Valuation of Wedding Gifts).”

¹⁰ Proposed Conference Report No. 1, April 5, 1990, pg. 3. The conference committee also “considered but rejected a broader definition of home hospitality in favor of the existing regulation.” (SB 1738, Senate Rules Committee, proposed conference report No. 1, dated April 5, 1990, p. 4.) Other provisions of the bill related to revolving door and ethics orientation became operative after Proposition 112 (SCA 32) was passed by the voters on June 5, 1990.

With the enactment of SB 1738, (and the passage of the companion ballot measure Proposition 112), the Commission embarked on a large regulatory project to interpret the new laws. The Commission's existing regulations on gifts and honoraria were also reorganized and renumbered as part of the project.

In 1994, the Commission adopted regulation 18942, which specified the new statutory exceptions to the definition of "gift" and "gift limits". As part of the changes, regulation 18727 was repealed and the substance of its exceptions for home hospitality and gifts exchanged on holidays was incorporated in regulation 18942(a)(7) and (a)(8).¹¹

The most recent and current advice is contained in the *Lewis* Advice Letter, A-93-173, where an official asked about the consequences of receiving baby gifts at a baby shower held for the official and his spouse. Staff cited regulation 18726.2(a)-(d) [renumbered as regulation 18944 in 1994], the "family gifts" regulation. The regulation in pertinent part, states, "gifts given directly to members of an official's immediate family are not gifts to the official unless used or disposed of by the official or given by the recipient member of the official's immediate family to the official for disposition or use at the official's discretion."

Staff advised that gifts given to an official at a baby shower that are intended for use by the official's child are considered gifts to the child. Staff also advised that since a baby shower is held for the benefit of the official and his spouse, the official's pro rata share of the total cost of the event is deemed a gift to the official.

Wedding Gifts Exemption

In 1981, the Commission considered amendments to regulation 18727 to specifically include "wedding gifts" from individuals (other than lobbyists or corporations), in the list of exceptions to the definition of reportable gifts.¹² At the time, a question was raised regarding the Commission's authority to promulgate such regulation under section 82028 (which defines a gift as a payment for which no consideration is given).¹³

However, staff stated in a Legal Division memorandum¹⁴ that "the proposed regulation, which only covers wedding gifts from individuals (other than lobbyists) is based on a similar assumption that individuals normally receive wedding gifts (of approximately equal value) from the same people to whom they (or their families) give

¹¹ Legal Division Memorandum by Mark T. Morodomi, dated July 26, 1991, regarding "Prenotice Discussion of Gift Regulations," p. 6.

¹² Legal Division Memorandum by Barbara Milman dated March 19, 1981 regarding "Reporting Wedding Gifts."

¹³ The statutory authority question has since been resolved with the passage of SB 1738 in 1991, which includes a specific exemption for wedding gifts.

¹⁴ Legal Division memorandum by Barbara Milman dated March 19, 1981 regarding "Reporting of Wedding Gifts."

such gifts. The time period over which the exchange takes place may be longer than in the case of birthday or holiday gifts; nevertheless, there is still an exchange of gifts.”

The memo also listed policy justifications for the proposed regulations. It said, “There is a privacy interest in wedding gifts from individual family members and friends, and such gifts ordinarily do not raise the suspicion that they are being made to influence official action, rather than as an expression of friendship, at least if they are not unduly large. Wedding gifts from corporations, businesses or lobbyists, on the other hand, are more likely to be made with an eye toward gaining influence with public officials; such gifts must still be disclosed under the proposed regulation.”

The memo indicated that staff believed wedding gifts may be treated differently for reporting purposes, from other gifts exchanged more *regularly* such as birthday and holiday gifts, because of the issue of consideration, and the longer time period in which an exchange of wedding gifts takes place, if at all. Staff proposed two approaches, one which would exclude wedding gifts (other than gifts from lobbyists or non-individuals), from the definition of gifts for purposes of reporting. In the alternative there was a proposal where the Commission could sponsor legislation to raise the reporting threshold for wedding gifts.

At its April 6, 1981, meeting, the Commission rejected the proposal to exclude wedding gifts from the definition of reportable gifts.¹⁵ The Commission instead decided to seek legislation to raise the reporting threshold of all gifts from \$25 to \$50, in an effort to resolve the issue of reporting “purely personal gifts” on officials’ Statements of Economic Interests.¹⁶ Minutes of the meeting stated that the Commission “reasserted a previous staff position that gifts ‘exchanged’ between an official and a person, other than a lobbyist, on weddings were *not* reportable as long as the gifts were of equal value.”¹⁷ The staff was instructed to disseminate the Commission’s policy in the next FPPC Bulletin.

The Commission’s policy as stated in the April 23, 1981 FPPC Bulletin in an article entitled “Wedding Gifts” stated:

“Section 18727 provides that gifts exchanged between an official and a person, other than a lobbyist, on birthdays, holidays and similar occasions are *not*

¹⁵ Minutes of Commission Meeting on April 6, 1981.

¹⁶ Legal Division staff noted there was a privacy concern regarding the \$25 threshold for gift reporting, because of the perception that this amount would include “truly personal gifts” rather than gifts from lobbyists, associations, or corporations. However, a staff analysis of Statements of Economic Interests showed that “even among the smallest reportable gifts, \$25-\$50, there are very few truly personal gifts being reported. Apparently, one of the reasons for the small number of reported gifts from individuals is the Commission’s regulation 2 Cal. Adm. Code Section 18727 which limits the definition of gift...” from (Legal Division Memorandum, by Robert M. Stern and Barbara Milman dated Feb. 5, 1981, on “Gifts Reported on Statements of Economic Interests: Statement of Reasons.”)

¹⁷ This appears in the April 23, 1981 FPPC Bulletin. It stated that an official *must report gifts received at a wedding, wedding shower or baby shower* unless the official has made a gift of the same type to the donor or the official and donor regularly exchange gifts and it can be assumed that such an exchange would occur at a later time.

reportable so long as the gifts are of approximately equal value. Under this regulation, an official *must report gifts received at a wedding, wedding shower or baby shower unless*:

1. The official has made a gift of the type in question to the donor in the past; or
2. The official and the donor exchange gifts on holidays, birthdays and similar occasions. Therefore, it can be assumed that when appropriate, the official will make wedding or baby gifts to the donor.”

Thus, wedding gifts were not reportable if the above criteria were met. This language was never part of the language of regulation 18727, but was accepted as the rule for reporting of wedding gifts. In addition, the same rules applied to gifts received at wedding showers and baby showers, although these events are also not specifically included in regulation 18727.

In 1990, legislation was passed that specifically provided that wedding gifts would not be “limited or prohibited” under section 89504 (renumbered to 89503 and applied to specified local officials and candidates in 1995).

Section 89503(e) states, “This section shall not prohibit or limit the following:

- (1) Payments, advances, or reimbursements for travel and related lodging and subsistence permitted by Section 89506.
- (2) Wedding gifts and gifts exchanged between individuals on birthdays, holidays, and other similar occasions, provided that the gifts exchanged are not substantially disproportionate in value.”

In 1994, the Commission adopted regulation 18942, which incorporated the statutory exemption for wedding gifts under 18942(b)(2). The Commission interpreted language in section 89503(e) to state that wedding gifts are reportable but *not* subject to limits.

Gifts to an Official’s Child

In 1986, the Commission adopted regulation 18726.2, which codified existing Commission advice and opinions regarding gifts to an official and his or her family.

This regulation reflected past Commission advice on the question of whether a gift, which is ostensibly made to a member of an official’s immediate family, is considered a gift to the official, and if so, how it is to be valued.

The regulation codified the Commission’s opinion (*In re Cory* (1976) 2 FPPC Ops. 48) and subsequent staff advice that gifts given to family members of an official are

not attributed to the official unless the official controls the gifts, uses them, or receives a benefit from them. Gifts to officials' family members are therefore not subject to the reporting provisions or the prohibitions of the Act.

The *Cory* opinion involved the issue of gifts received by an official's wife and children. The official asked what restrictions and reporting requirements applied to such gifts. The Commission stated that, "Gifts received by the spouse of an elected state officer are the separate property of the spouse and do not have to be disclosed...." "Similarly, gifts to the children are not income to the state officer and do not have to be reported," the Commission concluded.

However, the opinion articulated a "benefit-use" standard in which a gift made to a spouse or dependent child would be considered a gift to the official if: "(1) The nature of the gift is such that the official is likely to enjoy direct benefit or use of the gift to at least the same extent as the ostensible donee; and (2) The official in fact enjoys such direct benefit or use; and (3) There are no additional circumstances negating an intent to make an indirect gift to the official." (*In re Cory* (1976) 2 FPPC Ops. 48.)

The Commission stated that the first criterion is met if the official would derive a direct benefit from use of the gift to the same extent as the official's spouse or dependent children. The Commission stated, "For example, a work of art, a television set or packaged foods and beverages are, by their nature, likely to be shared and thus the official is likely to enjoy direct benefit or use of these gifts. On the other hand, an article of clothing, a wrist watch or a free hang gliding lesson given to the spouse or dependent child of an official would not directly benefit the official, and it cannot be anticipated that the official would use the gifts. Accordingly, such gifts would not, absent unusual circumstances, be gifts to the official."

"Even if the first criterion is met, the gift is not received by the official unless he or she in fact uses or benefits from the gift. For example, if an official's spouse receives a painting which is hung in his or her office, the work of art is not a gift to the official" because even if artwork is shared by both spouses, in this situation, the official would not benefit from the gift, and thus it would not be considered a gift to the official.

Moreover, even if it is apparent from the nature of the gift that the official will benefit from the gift, and the official has in fact, used the gift, the third criterion may negate the donor's intent to make a gift to the official. The Commission stated, "In particular, the existence of a working or social relationship between the donor and the spouse or child will rebut any inference that the donor intended to make a gift to the official." For example, if the spouse of an official received a retirement gift, such as a painting, from his or her employer, the relationship between the spouse and employer could rebut the presumption that the gift was intended for the official, even if the official benefits from the gift.

The Commission also concluded that "gifts to dependent children are not included in the definition of 'gift' in Section 86201" and that gifts to the spouse and dependent

children of an elected state officer are not subject to the reporting provisions or the prohibitions of the Political Reform Act. (*In re Cory*, 2 FPPC Ops. 48, 51.)

“For instance, if an official and spouse are taken to dinner, the dinner consumed by the spouse is a gift only to that spouse, not to the official. However, a color television set given to the official’s family and used by the official as well as other family members, is considered to be a gift to the official. When tickets or passes are mailed to the official and the official’s spouse and family, only the ticket intended for the official is considered a gift to the official unless the official exercises control over the other tickets, such as giving them to friends, constituents, associates, etc.”¹⁸

In 1991 and 1992, the Commission undertook a major revision of its “gift” regulations. There were proposals to amend the language of regulation 18726.2, as part of a larger regulatory project involving the new honoraria, gift and travel provisions of the Act as a result of passage of SB 1738, as discussed above. One such proposal involved amendments that would reflect subsequent staff advice¹⁹ which turned on the *intent* of the donor in determining whether the gift would be attributed to an official or his or her family member. Staff noted that delivering a gift to a family member of an official may be a way to circumvent the protections of the Act.²⁰

However, numerous discussions and proposals to amend the regulation were not successful, as the regulated community, including leaders of the state Senate and others, vigorously opposed the changes because “revising the regulation would create unsuspected pitfalls for public officials.”²¹ At the Commission’s August 12, 1993 meeting, the Commission decided not to move forward with any revisions to the regulation.

In 1994, this regulation was renumbered and now exists as regulation 18944. The language of former regulation 18726.2 was incorporated in its entirety without changes.

¹⁸ These examples were outlined on page 6 in the Legal Staff Division memorandum by Robert E. Leidigh dated October 24, 1985, regarding “Proposed Gift Regulations, 2 Cal. Adm. Code Sections 18726 through 18726.9, inclusive.”

¹⁹ *Combs* Advice Letter, No. A-87-141, in which the gift was free use of a condominium in Hawaii, the direct recipient was the spouse of the public official, and the donor was the recipient’s employer who was only casually acquainted with the public official. The recipient asked the donor for permission to share the condominium with her spouse and permission was granted. Use of the condominium by the official under these circumstances was not deemed a gift to the official because the facts showed that there was no intent by the donor to give a gift to the official.

²⁰ Legal Division Memorandum by Mark T. Morodomi, dated July 26, 1991 regarding “Prenotice Discussion of Gift Regulations,” p. 9.

²¹ Legal Division Memorandum by Scott Hallabrin, dated July 15, 1993, regarding “Gift Regulations for the Commission’s August Meeting.” The memo, referring to a July 7, 1993 interested person’s meeting stated that, “After a prolonged discussion, the consensus among the meeting’s non-staff attendees was that revising the regulation could create unsuspected pitfalls for public officials. Consequently, staff will not propose a revision of Regulation 18726.2 at this time...”

The most recent change in the gift area occurred in 1997, with the amendment of section 82028. The definition of “gift” was amended to mean (in addition to other requirements under current law) “any payment that confers a personal benefit on the recipient.” A Senate bill analysis stated that the changes were “specifically intended to resolve the issue of whether a public official receives a ‘gift’ when no personal benefit accrues to the official from the item.” However, the legislative analysis noted that the amendment is “not intended to result in changes to existing FPPC regulations and interpretations regarding gifts to family members of public officials, which are generally consistent with the change made by this bill.”

IV. APPROACHES

In March 2005, the Commission adopted amendments to regulation 18946.2(b) to provide for reporting of a public official or candidate’s pro rata share of the cost of invitation only events – such as a banquet, party, gala, celebration or similar function. This amendment was prompted in part by concerns regarding the proper method of determining the value of a gift received by public officials who took part in Super Bowl festivities by attending the Commissioner’s party –an “invitation-only” event connected to San Diego’s hosting of the Super Bowl in January 2003.

Since these amendments were adopted involving “invitation-only” events, the Commission’s Technical Assistance Division has received inquiries from the regulated community expressing concern that the definition of “invitation only” events in regulation 18946.2(b) was so broad as to include attendance of wedding receptions.

Similar concerns have been raised regarding the misperception that birthday parties, holidays or similar celebrations are included in the definition of “invitation-only” events, thus requiring a public official or candidate report his or her pro rata share of the cost of such an event.

A strict application of the definition of “invitation-only” events under regulation 18946.2(b) would appear to include such events. However, such an interpretation would be at odds with the Commission’s long-standing view that certain transactions – such as an exchange of gifts due to family ties or personal friendships where the intent is not to influence or win favor with the recipient—are outside the policy considerations of the Act.

In this regulation project, staff was asked to explore the possibility of limiting the scope of amendments to regulation 18946.2(b), by amending the Commission’s gift exception rules. Staff was directed to amend gift regulations in order to provide an appropriate exception for gifts of food, drink and nominal benefits received by officials’ and candidates’ attendance²² at certain special occasions of personal significance such as wedding receptions, birthday parties, holidays, and other similar events.

²² If such events are considered “invitation-only” events, then an official must report his or her pro rata share of the food, drink, entertainment and nominal benefits received by attending such an event, if his or her pro rata share is \$50 or more. In addition, an official would also be subject to \$360 gift limit and disqualification rules.

There have also been concerns raised regarding the lack of specific provisions covering the reporting of gifts given to an official directly, but intended for use by the official's child such as baby shower gifts. Staff was also asked to craft amendments that would expressly provide that gifts given to an official that are intended for the use of the official's child (such as baby shower gifts) are considered gifts to the child, not the official.

In proposing this regulatory project, Commission's Technical Assistance Division had initially suggested codifying current staff advice regarding home hospitality pertaining to attendance at weddings as expressed in the *Foster* Advice Letter, A-93-156. In the *Foster* letter, a legislative aide was marrying a lobbyist and asked whether the lobbyist, who was paying for a significant portion of the wedding, would be subject to the \$10 lobbyist gift prohibition and reporting requirements for the benefits (such as food, drink, entertainment) provided to legislative officials at the wedding reception. Staff advised that "food, beverages and other nominal benefits provided to an official at a wedding reception are very similar to benefits provided in the context of home hospitality and should not be limited or subject to disclosure."

Moreover, if the proposed amendments (as discussed below) in this regulatory project are approved, the home hospitality rationale set forth in *Foster, supra* regarding wedding receptions, would no longer be applicable.

However, the letter did not cite a specific statutory or regulatory basis for this advice. In addition, staff was concerned that expanding the home hospitality rule to extend to celebrations outside the home could potentially lead to abuse.²³

Staff explored various other approaches to resolving the above issues. Some of the options discussed included:

- 1) Adding exceptions to "invitation-only" events in regulation 18946.2(b). This would entail including a list of occasions (such as birthdays, anniversaries, baby showers, etc.) that would fall outside the definition of "invitation-only" events.
- 2) Creating a "gifts exchanged" exception under regulation 18942(a)(8) for food, drinks, entertainment and nominal gifts received through attendance at specific functions such as weddings, funerals, and anniversaries.

²³ In 1990, the Legislature also considered and rejected the idea of expanding the exception for "home hospitality" as part of a general governmental ethics reform bill – SB 1738 (Roberti) – which passed and amended section 89503, regarding exceptions to gift limits. A Senate Rules Committee analysis dated January 25, 1990, stated that the conference committee considered and rejected a broader definition for "home hospitality" that would extend the definition beyond "gifts involving food beverages or lodging provided by an individual in his or her home."

- 3) Further defining the term “similar occasion” in regulation 18942(a)(8) by including a specific list of special or “similar” occasions (such as weddings, anniversaries, bar mitzvahs, Kwanzaa, etc.) at which officials and candidates can exchange gifts and not be subject to gift reporting rules or gift limits, so long as the value of the gifts exchanged is not substantially disproportionate in value.
- 4) Including “wedding gifts” under the exception for reporting and gift limits in regulation 18942(a)(8). Wedding gifts of \$50 or more are currently reportable under regulation 18942(b) but *not* subject to limits.

During these discussions, the Enforcement Division expressed a preference for a more clear-cut, bright line rule, which would include a list of events that qualified as “birthdays, holidays, or similar occasions” (such as Christmas, wedding receptions, wedding anniversaries) and a list of events that did not fit the rule (such as Super Bowl parties, and other sporting event celebrations, as well as business-related or corporate-sponsored events.) However, other staff expressed a preference for a less specific rule that could be more broadly applied. The broader language was preferred because staff felt that it would be difficult to further define the term “similar occasion,” and because staff believed that it may not be possible to create an all-inclusive list of such special events.

After exploring various approaches, staff determined that an exception for food, drink, entertainment and nominal benefits received by an official attending an event such as a wedding reception, birthday, holiday or other similar occasion, could be achieved by adding it to the definition of “gifts exchanged” in regulation 18942(a)(8).

However, this proposed amendment is not a clear-cut, bright-line rule; therefore, it may be more difficult to enforce. Also, the language does not reflect that *wedding gifts* are exempt and are treated differently from other “gifts exchanged.” Under regulation 18942(b)(2), wedding gifts are reportable but not subject to gift limits.

Staff also determined that “family gifts” regulation 18944 could be amended to specifically provide that gifts given to an official, but intended for an official’s child, such as baby shower gifts, would be considered gifts to the child. This amendment would reflect the Commission’s opinion (*In re Cory* (1976) 2 FPPC Ops. 48) and subsequent staff advice in *Lewis* Advice Letter, A-93-173.

V. REGULATORY AMENDMENTS

Proposed Amendments to regulation 18942(a)(8):

The proposed regulatory amendment to regulation 18942(a)(8) would clarify that food, drink, entertainment and nominal benefits received by an official attending an event such as a wedding reception, birthday, holiday and other similar occasions (hosted by another individual, not a corporation) fall under the “gifts exchanged” exception of

section 89503(e)(2), and therefore are not subject to gift limits and reporting rules so long as the gifts exchanged are not substantially disproportionate in value.

The proposed amendments to regulation 18942(a)(8) would state that none of the following is a gift and none is subject to any limitation on gifts:

“(8) ~~Presents~~ Gifts exchanged between an ~~official~~ individual who is required to file a statement of economic interests and ~~an~~ another individual, other than a lobbyist, on holidays, birthdays, or similar occasions to the extent provided that the ~~presents~~ gifts exchanged are not substantially disproportionate in value. For purposes of this subdivision, “gifts exchanged” includes food, beverages, entertainment, and nominal benefits provided at the event by the honoree or another individual, other than a lobbyist, hosting the event.”

This proposed amendment narrows the scope of regulation 18946.2(b) with respect to “invitation-only” events. The language is broad enough to cover the whole range of occasions of personal significance where gifts are traditionally exchanged, such as weddings, retirement parties or the birth or adoption of a child.

Although not specified in the proposed regulatory language, wedding gifts will continue to be reportable, but not subject to gift limits (under regulation 18942(b)(2)) due to the specific provisions of section 89503(e), as discussed above.

In addition, if the Commission decides that the regulation should include references to specific events, then staff will conduct that review.

Proposed Amendments to regulation 18944:

Proposed amendments to 18944(a) would add a specific provision stating that gifts given directly to an official but intended for use of the official’s child (such as baby shower gifts), are gifts to the child.

“(a) Gifts given directly to members of an official's immediate family are not gifts to the official unless used or disposed of by the official or given by the recipient member of the official's immediate family to the official for disposition or use at the official's discretion. Gifts that are given to an official that are intended for use by the official’s child are considered gifts to the child.”

This proposed amendment clarifies and codifies existing Commission opinion and advice with respect to family gifts.

VI. STAFF RECOMMENDATION

Staff proposes noticing amendments to regulations 18942 and 18944 for adoption at the April 2006 Commission Meeting.

Attachment:

Proposed amendments to regulations 18942 and 18944